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No. 00-1241

Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL LEWIS, former Director of the Arizona Department of Corrections, in his official and individual capacities, et al.,

Petitioners,

v.

DENNIS JOHNSON, et al.,

Respondents.

TERRY STEWART, Director of the Arizona Department of Corrections, in his official and individual capacities, et al.,

Petitioners,

v.

LEROY BACA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether these cases are properly before the Supreme Court given the procedural nature of the court of appeal's decision.

Whether *Whitley v. Albers*, 475 U.S. 312 (1986), was correctly applied to the conditions of confinement claim by the court of appeals.

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REASONS TO DENY THE PETITION

The court of appeals reversed the district court's decisions granting summary judgment to Petitioners because the district court had improperly applied the summary judgment standard. The court of appeals determined that the affidavits and depositions of the Respondents were sufficient to present genuine issues of fact in dispute, despite the videotaped evidence presented by Petitioners, which partially refutes the Respondents claims. After reversing the district court's decisions for the above reason, the court of appeals went on to address the district court's application of *Whitley v. Albers*. The discussion of *Whitley* was not necessary to the decision to reverse the grant of summary judgment. If the court of appeals' discussion of *Whitley* is ever appropriate for review by this court, it would only be appropriate after the case has gone to trial as remanded by the court of appeals. At that point, if Petitioners believe the district court's application of *Whitley* as directed by the court of appeals was incorrect, the appellate process will remain available to Petitioners at that time.

I. The decision made by court of appeals was based solely on a procedural issue

A motion for summary judgment should only be granted if the moving party can show that no genuine issue of material fact exists. Federal Rule of Civil Procedure, Rule 56 (c), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In addition, the evidence in question should be viewed in the light most favorable to the non-moving

party. *Eastman Kodak Co. v. Image Tech. Svcs.*, 504 U.S. 451, 456 (1992) and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-1.

Eighth Amendment cases which challenge the conditions of confinement require that a Respondent make two showings. First, the Respondent must make an "objective" showing that the conditions of confinement included a deprivation which was "sufficiently serious." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Second, the Respondent must make a "subjective" showing that the prison official acted with a "sufficiently culpable state of mind." *Id.*

The district court in the these cases granted summary judgment based only on the first showing. Pet.App. at 8-9. The district court decision was based on that court's opinion that the Respondents had failed to show "either pain or denial of basic needs" and therefore "cannot show an Eighth amendment violation." Pet.App. at 31, *see also* Pet.App. at 8-9 ("The district court in these cases did not reach the question of the second required showing. . . . "). In the words of the court of appeals, the district court found that "the deprivations alleged by the plaintiff classes were not sufficiently serious to violate the Eighth Amendment." Pet.App. at 9.

The district court determined that the existence of videotapes which purported to refute the Respondents' affidavits and depositions were dispositive of the issue of whether or not an Eighth Amendment violation took place. In making this determination, the district court misapplied the summary judgment standard. In its opinion in the Johnson case, the court states that "[t]he video exhibits put many facts beyond dispute." Pet.App. at 33. This statement necessarily discounts the affidavits and depositions of the Respondents and indicates that the district court was improperly weighing the evidence. The Baca opinion states that the presence of the videotaped evidence makes the deposition testimony of Respondents "scant evidence that the actions of the prison officials resulted in the infliction of pain." Pet.App. at 42. The district court, in making this statement, was again improperly weighing the evidence and making the judgment that the videotaped evidence foreclosed any possibility that a jury could believe the testimony of the Respondents.

Respondents contend, not only that they were deprived of their basic needs, but that the few necessities which were provided were far from sufficient to meet these basic needs. For example, they contend that the sandwiches were spoiled and inedible and portable bathrooms were scarce and were soon filled with waste to the point of being unsanitary and unusable. The fact that a videotape from the Johnson case may show a few Respondents receiving food does not prove that all Respondents received food. Nor does the videotape show whether the food received was edible or, as claimed by Respondents, rotten from the Arizona sun. Similarly, a

videotape of the presence of a portable bathroom does nothing to disprove allegations that the bathroom was not available to Respondents on a sufficient basis, that it was overflowing with waste or that Respondents were forced to urinate and defecate on themselves due to the inadequacy of the bathroom facilities. The videotape in Baca may show some Respondents wearing winter clothes, but that does not disprove the allegations that some Respondents were improperly dressed, nor does it speak to the sufficiency of the purported winter clothing in terms of its weight or resistance to cold and moisture. A jacket which appears adequate visually, may not actually be adequate when lying on damp ground for an entire night.

The court of appeals agreed with Respondents that the factual issues regarding the adequacy of food, water, shelter and bathroom facilities were not disposed of by the presence of the videotape. As the court of appeals stated, "[t]his videotape evidence is important and may eventually be dispositive in favor of the state. At this stage of the litigation, however, it does not overcome the plaintiffs' evidence." Pet.App. at 11. The court of appeals concluded that there existed "disputed questions of material fact that cannot be resolved at summary judgment" and that a factfinder could "conclude that the plaintiffs suffered a sufficiently serious deprivation to violate the Eighth Amendment." Pet.App. at 12.

Because the district court made its decisions based upon its belief that the harm suffered was not sufficiently serious, the court of appeals effectively reversed those decisions when it determined that evidence existed from which a jury could determine that sufficiently serious

deprivation did, in fact, take place. No further discussion or action was necessary from the court of appeals. Nonetheless, the court of appeals addressed the district court's application of *Whitley*, even though *Whitley* does not apply to the objective, but only the subjective portion of an Eighth Amendment claim. The district court did not reach the subjective part of the Eighth Amendment analysis. The basis for the court of appeals' decision was purely procedural and, as such, does not present the sort of question which merits the consideration of this Court.

II. The court of appeals correctly applied *Whitley*

Even though the district court did not reach the subjective part of the Eighth Amendment analysis, the court of appeals discussed *Whitley* and its application to the facts at hand. *Whitley* held that during a riot situation, a heightened standard of deference applies to the prison officials' actions. The reasoning behind the *Whitley* standard is that the deliberate indifference standard set out by *Estelle v. Gamble*, 429 U.S. 97 (1976), does not consider the forces at play when a decision is "made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. 310, 320 (1986).

Whitley does not apply to conditions of confinement cases; it only applies "when an inmate seeks to hold an individual prison officer liable for using excessive force against the Respondent during a particular incident." *Madrid v. Gomez*, 889 F.Supp. 1146, 1247 (N.D.Cal. 1995). This is not the situation in the *Baca* and *Johnson* cases. The Respondents seek to hold prison officials and administrators responsible for the inhumane conditions they were

forced to endure following the riot. Clearly the *Whitley* standard does not apply in this case as there is no "particular" incident of excessive force which is being alleged. Respondents allege that the overall conditions, including lack of food, water, sanitary facilities and shelter were inhumane and in violation of the Eighth Amendment. The Respondents allege deprivations which set out a conditions of confinement claim to which the lower standard of deference set out in *Estelle* applies. *See Madrid*, 889 F.Supp. at 1246 ("This 'baseline' standard applies in cases alleging . . . inhumane conditions of confinement that deprive an inmate of a basic necessity of life, such as shelter, food, health or exercise.")

Even if this was considered an excessive force case, *Whitley*, itself, contemplates the idea that, after a riot has ended and the inmates are under control, the heightened standard of deference to prison officials is no longer applicable. In *Whitley*, the Court stated that "although the evidence could be taken to show that the general disturbance had quieted down," a hostage situation still existed and armed inmates were still at large. *Whitley*, 475 U.S. 322-3. The Court believed that "[t]he situation remained dangerous and volatile." *Id.*

By addressing whether the riot had actually ended, the *Whitley* court recognized that there is a finite time to which the heightened standard of deference applies. Other courts have also recognized that when exigent circumstances cease to exist, the *Whitley* standard ends as well. *See, e.g., Foulds v. Corley*, 833 F.2d 52, 54 (5th Cir. 1987) (when there is "no imminent danger" in a prison disciplinary action, *Whitley* does not apply). The courts of

appeals also agree that *Whitley* does not apply after the need for making split second decisions passes.

Petitioners believe that the courts of appeals differ in their application of *Whitley*, citing several cases beginning on page 16 of their Petition. Petitioners' interpretation of these cases is incorrect. These courts may reach different decisions as to whether the *Whitley* standard applies to their cases, however, these differences are not due to disagreement as to how to apply *Whitley*. These differences arise because the courts of appeals are correctly applying *Whitley* to their particular factual situations and reaching appropriate decisions about whether their facts present exigent circumstances justifying the heightened standard. Because some of the courts determine that their facts warrant the *Whitley* standard while others decide the original standard set out in *Estelle* is appropriate does not mean that they are misapplying *Whitley*.

In fact, these cases simply demonstrate that the courts of appeals recognize the basic legal principal "that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation." *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991); *see also Sims v. Mashburn*, 23 F.3d 980, 984 (11th Cir. 1994) ("The general principle, explained the court, is that the application of force after it is no longer penologically justified can violate the Eighth Amendment.")

CONCLUSION

Because there is no confusion among the courts of appeals as to when and how to apply the *Whitley* standard, and because the district court in these cases did not even reach the subjective question to which *Whitley* properly applies, these cases are not appropriate for review by the Court. In addition, the court of appeal's decision was based solely on the basis of the correct application of the standard for summary judgment. This is a standard which is well-established and does not require any further review by this court. For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

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